IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO "DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO JOIN THE CHEROKEE NATION AS A REQUIRED PARTY OR, IN THE ALTERNATIVE, MOTION FOR JUDGMENT AS A MATTER OF LAW BASED ON A LACK OF STANDING" [DKT #1788 & #1790]

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Plaintiff, the State of Oklahoma ("the State"), respectfully requests that "Defendants' Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party or, in the Alternative, Motion for Judgment as a Matter of Law Based on a Lack of Standing" [DKT #1788 & #1790] ("Motion") be denied in its entirety.[1]

I. Introduction

Defendants' Rule 19 Motion should be denied for the following reasons: ***First,*** it is based upon the erroneous premise that the Cherokee Nation ("the CN") owns and asserts its sovereign authority over *all* the natural resources of the Illinois River Watershed (the "IRW") in Oklahoma, and that it does so *to the exclusion of the State*. ***Second,*** the CN is not a required party within the meaning of Rule 19(a). ***Third,*** even were it determined that the CN is a required party as to some or all of the State's claims under Rule 19(a), equity and good conscience weigh strongly against dismissal under Rule 19(b).

Defendants' alternative Motion for Judgment as a Matter of Law[2] should be denied for the following reasons: ***First,*** Defendants' Motion is facially improper as it is not founded on any applicable Federal Rule of Civil Procedure. ***Second,*** as explained in its responses to Defendants' earlier motions on the topic of standing, *see* DKT #1111 & #1255, as well as for the reasons set forth below, the State has standing by virtue of its sovereign interests, quasi-sovereign / parens patriae interests, trustee interests and property interests. ***Third,*** the Arkansas River Basin

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[1] Defendants seek dismissal with prejudice. However, under Rule 41(b), a dismissal for failure to join a necessary party is *without* prejudice. *See* Fed. R. Civ. P. 41(b). Likewise, a dismissal for lack of standing is *without* prejudice. *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216 (10th Cir. 2006).

[2] This Court previously denied Defendants' Rule 12(c) motion pertaining to standing (DKT #1076), *see* DKT #1187 & #1435, as well as Defendants' Rule 12(b)(6) motion pertaining to the State's standing as to its repled trespass claim (DKT #1235). *See* DKT #1439.

Compact provides the State standing. ***Fourth,*** Defendants have already admitted that the State is the owner of waters encompassed within the historical bounds of the CN.

II. Background

A. The State's claims against Defendants

The State's lawsuit is about stopping Defendants' pollution-causing conduct and remedying the effects of that conduct on natural resources in Oklahoma.[3] To this end, the State has asserted ten causes of action against Defendants, seeking, *inter alia*, injunctive relief and damages from Defendants for injuries to these natural resources. *See* DKT #1215. Significantly, the State does not seek to adjudicate what interests the CN has in the land, water and other natural resources of the IRW. Moreover, the State seeks neither damages from nor an injunction against the CN or any CN member.

The State asserts its claims in this lawsuit pursuant to its sovereign, quasi-sovereign / parens patriae, trustee and / or property interests. *See, e.g.*, DKT #1215, ¶¶ 5, 78 & 119. These interests are well-established, and in fact this Court has already determined that the State has standing to prosecute the claims in this lawsuit. *See* DKT #1187, #1435 & #1439. Notably, the State is not required to own or possess an exclusive interest in any of the natural resources at issue in order to have standing to prosecute any of its claims in this lawsuit. As such, the Court need not determine the nature and extent of the CN's interests in the natural resources of the IRW in order to resolve Defendants' Motion.

B. Defendants have mischaracterized the nature and extent of the interests the CN has in the natural resources of the IRW

[3] Defendants incorrectly assert that the State is seeking "monetary damages and injunctive relief for alleged environmental injuries to the *entire* million-acre Illinois River Watershed." *See* Motion, p. 1 (emphasis in original). As is clear in the Second Amended Complaint, DKT #1215, the State is seeking damages and relief to address the injured natural resources located *within the Oklahoma portion of the IRW*.

The central premise of Defendants' Motion is that the CN has and claims an *exclusive* interest in *all* the land, water and other natural resources in the IRW, and does so to the exclusion of the State of Oklahoma. To wit, Defendants have variously stated:

- That "the federal government transferred *all* of the water and other natural resources within the Oklahoma portion of the IRW to the Cherokee Nation before Oklahoma became a state, and those natural resources *remain* the *exclusive* property of the Cherokee Nation today." *See* Motion, p. 4 (emphasis added).

- That "the Cherokee Nation today continues to hold sovereign authority over [the waters, sediments and biota] *to the exclusion of the State*." *See* Motion, p. 10 (emphasis added).

- That "the Cherokee Nation continues to own and to assert its authority over the lands and other natural resources granted by the treaties with the United States, including the natural resources of the IRW." *See* Motion, p. 14.

- And that "the grants to the Cherokee encompass *all* surface water in both navigable and nonnavigable streams within the IRW, groundwater, streambeds, biota, and any lands that are currently, or were historically, submerged." *See* Motion, p. 15 (emphasis added).

These are severe mischaracterizations of the nature and extent of the interests that the CN had or has in the natural resources in the IRW. It is beyond dispute that the natural resources of the IRW are not all owned, exclusively or otherwise, by the CN. For example, the State and many Oklahoma citizens own land throughout those portions of Adair, Cherokee, Delaware, and Sequoyah counties within the IRW. It is equally apparent that the State exercises sovereign authority over the natural resources of the IRW and is, thus, not excluded from the exercise of such authority. *See, e.g.*, Ex. 1 (Affidavit of J.D. Strong). While the Court need not determine the nature and extent of the CN's interests in the natural resources of the IRW, the brief discussion that follows confirms Defendants' mischaracterization of the CN's interests.

1. The CN does not have an exclusive ownership or sovereignty interest in all of the natural resources of the IRW

a. Interests in the water and land

Nothing in either the 1833 Treaty with the Western Cherokee or the 1835 Treaty of New Echota expressly conveyed title to the water. Rather, the 1833 Treaty expressly conveyed *land*. *See* 7 Stat. 414 (conveying to the Cherokee "seven millions of acres of land"). Similarly, the 1835 Treaty expressly conveyed *land*. *See* 7 Stat. 478 (conveying to the Cherokee "the following additional tract of land"). No mention is made of water in either treaty.[4] If an implicit right to water is to be read in either the 1833 or 1835 treaties, then those treaties impliedly conveyed no more than a *"Winters* right" to the water within these conveyances. Under *Winters v. United States*, 207 U.S. 564 (1908), when the Federal Government reserves land, by implication it reserves water rights necessary to accomplish the purposes of the reservation. However, such a right reserves only that amount of water necessary to fulfill the purpose of the reservation, and no more. *Cappaert v. United States*, 426 U.S. 128, 141 (1976). If such an implied right ever existed, it was never quantified, and there is absolutely no reason to believe that in water-rich eastern Oklahoma the CN would have needed *all* of the water flowing through

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[4] The cases Defendants cite for the proposition that these treaties conveyed an interest in water are not on point. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), held that the United States conveyed to the Cherokee, Choctaw and Chickasaw Nations, title to *land* underlying the *navigable* portion of part of the Arkansas River in Oklahoma. *Choctaw* did not address water. In fact, Justice White in his dissent points out that "*[n]o one* suggests that the Cherokees were granted full sovereignty over the Arkansas River . . . ." *Choctaw*, 397 U.S. at 652 (emphasis added). In short, *Choctaw* says nothing about water.

Likewise, *United States v. Grand River Dam Auth.*, 363 U.S. 229 (1960), did not hold that the CN owned the water at issue. The principle holding in *Grand River* was simply that "[w]hen the United States appropriates the flow either of a navigable or nonnavigable stream pursuant to its superior power under the Commerce Clause, it is exercising established prerogatives and is beholden to no one." 363 U.S. at 233. As such, the Grand River Dam Authority was not entitled to compensation for being deprived of its opportunity to utilize the flow of the water to produce power.

Finally, Defendants grossly overstate articles 5, 6, and 26 of the 1866 Treaty with the Cherokee, 14 Stat. 799. *See* Motion, p. 8. In fact, Article 26 of the treaty serves to confirm that the extent of the CN's interests were *in land*. *See* 14 Stat. 799 (the CN "shall also be protected against inter[r]uptions or intrusion from all unauthorized citizens of the United States who may attempt to settle on their *lands* or reside in their territory") (emphasis added).

the lands conveyed to it or that the CN ever actually used *all* of that water. Thus, a *Winters* right would not have been an exclusive right to all the water in the IRW. *See, e.g., Sierra Club v. Block*, 622 F.Supp. 842, 852 fn. 7 (D. Colo. 1985) ("State law appropriators acquiring rights after a federal reservation receive only a defeasible property right until the extent of the federal right is established") (citations omitted).

However, if a *Winters* right was in fact impliedly conveyed, it was supplanted by the Organic Act of 1890, by which Congress provided for the adoption of Chapter 20 of the Mansfield Digest of the Statutes of Arkansas, which included the common law of England, as the law in Indian Territory. *See* 26 Stat. 81, § 31; *Franco-American Charolaise, Ltd. v. Okla. Water Resources Bd.*, 855 P.2d 568, 572 fn. 8 (Okla. 1990). The common law of England included the law of riparian rights, and thus the law of riparian rights dictated what interest the CN held in the water after 1890.[5] *See, e.g., Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001) ("An Indian tribe retains only those aspects of sovereignty not withdrawn by treaty or statute"); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (noting that specific treaty provisions or unilateral action by Congress may alter tribe's sovereign rights).

As explained in *Franco-American*, "[r]iparian rights arise from land ownership, attaching only to those lands which touch the stream. A riparian interest, though one in real property, is not absolute or exclusive; it is usufructuary in character and subject to the rights of other riparian owners. A riparian right is neither constant nor judicially quantifiable *in futuro*." 855 P.2d at 573. "[T]he accepted rule allows a riparian owner the right to make any use of water beneficial

[5] *See, e.g., Harris v. Brooks*, 283 S.W.2d 129, 132 (Ark. 1955) (riparian doctrine, long in force in Arkansas and many other states, is based on the old common law; the appropriation doctrine has never been adopted in Arkansas).

to himself as long as he does not substantially or materially injure those riparian owners downstream who have a corresponding right." *Id.* at 575.

Beginning in 1902, pursuant to Congressional enactment, lands held by the CN were allotted to individuals. *See* 32 Stat. 716. Each allotment conveyed "all the right, title, and interest of the Cherokee Nation, and of all other citizens, in and to the lands embraced in his allotment certificate." 32 Stat. 716, § 58. Allotments were originally alienable after five years, with subsequent Congressional action extending the restriction on the alienation period.[6] 32 Stat. 716, §§ 14-15 & 47 Stat. 777, § 1. The allotment of riparian land to its members conveyed to them a non-exclusive, usufructuary riparian interest.[7] Unallotted riparian land remaining in ownership of the CN has a similar non-exclusive usufructuary interest. Thus, the existence of a riparian right to reasonable use of water flowing by any parcel of land owned by the CN, or allottees who have not alienated their allotments, is not an exclusive sovereignty or ownership

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[6] Most of the lands have been alienated and therefore are no longer "Indian Country." *See* 18 U.S.C. § 1151. As explained in Leslie Hawes, "Indian Land in the Cherokee Country of Oklahoma," *Economic Geography* (Oct. 1942), pp. 401-412, in 1942: "Most of the land allotted to citizens of the Cherokee Nation has in the short period of three decades passed into the hands of the majority white population. . . . The rate of loss has been least in the eastern, or Ozarkian, section. Even here, the restricted Indians retain only a little over one-third the acreage allotted to them about a third of a century ago." As of 1986, of the original conveyance of seven million acres of land, only 92,405.97 acres (or less than 2%) remained as Indian Country. *See* Confederation of American Indians, *Indian Reservations: A State and Federal Handbook*, McFarland & Company, Inc., 1986, p. 215.

[7] Even assuming arguendo that this riparian usufructuary right to the water were to have remained with the CN rather than being conveyed to the allottee and that this usufructuary right was not extinguished when Oklahoma was admitted to the Union, "treaty-based usufructuary rights do not guarantee the Indians 'absolute freedom' from state regulation." *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204-05 (1999). The Supreme Court has "repeatedly reaffirmed state authority to impose reasonable and necessary non-discriminatory regulations" over Indian use of natural resources in the interest of conservation. *See id.* at 205 (addressing usufructuary right to hunt, fish and gather). Significantly, "Indian treaty-based usufructuary rights are not inconsistent with state sovereignty over natural resources." *See id.* at 208.

interest of the CN in all the water in the IRW. The existence of a right to reasonable use of water attaching to land ownership does not equate to a right to use all the water in the IRW or a right to prevent the State from using or regulating the water in the IRW.

b. Interests in the river beds and stream beds

In *Choctaw*, the Supreme Court held that the United States conveyed to the Cherokee, Choctaw and Chickasaw Nations title to land underlying the navigable portion of part of the Arkansas River in Oklahoma. 397 U.S. 620. However, for purposes of this case, the Illinois River and its tributaries are non-navigable, and thus *Choctaw* is simply inapplicable to the analysis. *See, e.g., Tobin v. Pennington-Winter Constr. Co.*, 198 F.2d 334, 335 (10th Cir. 1952) ("The Illinois River, *a non-navigable stream*, is a tributary of the Arkansas River, which in turn empties into the Mississippi River. The Arkansas and Mississippi Rivers are both navigable") (emphasis added).

As explained above, the Organic Act of 1890 supplanted whatever original rights the CN might have had in river and stream beds of the IRW with the English common law. *See* 26 Stat. 81, § 31. Under the common law, the riparian landowner owns the bed of an adjoining non-navigable river or stream to its centerline. *See, e.g., Hanes v. State*, 973 P.2d 330, 333 (Okla. Crim. App. 1999). Once the CN's lands were allotted, these allottees became the holders of the riparian interests in the beds of the Illinois River and its tributaries. *See, e.g., id.*, at 336-37 ("we find the Cherokee Nation allotted its interest in the riverbed of the Neosho or Grand River to the allottee of the riparian upland"). Thus, except in those instances where the CN itself still owns a

riparian lot of land or the allotment was never alienated, the CN has no ownership interest in the riverbed and streambeds at issue in this lawsuit.[8]

c. Interests in the biota

Defendants assert, *see* Motion, pp. 10-11, that the CN has exclusive ownership of the biota in the IRW. However, Defendants overlook the fact that nothing in either the 1833 Treaty with the Western Cherokee or the 1835 Treaty of New Echota states that the United States conveyed title to biota, including biota in the IRW, to the CN. As noted above, the treaties of 1833 and 1835 conveyed *land*, and not all biota, or even hunting and fishing rights, as did other treaties with other tribes in some cases relied upon by Defendants. *See* 7 Stat. 414 & 7 Stat. 478.

The cases Defendants rely upon do not support their broad assertion that the CN "continues to hold sovereign authority over those natural resources to the exclusion of the State." *See* Motion, p. 10. *Mille Lacs Band*, 526 U.S. at 204, dealt not with sovereign rights over or ownership of biota, but with usufructuary hunting and fishing rights "on state land [that] are not irreconcilable with a State's sovereignty over the natural resources in the State" but "can coexist with state management of natural resources." (Citations omitted.) *Washington v. Wash. Comm. Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 684-85 (1979), involved a treaty specifically reserving tribal fishing rights in "usual and accustomed places" (unlike treaties with the CN), and held that "[b]oth sides have a right, secured by treaty, to take a fair share of the available fish,"

[8] This is not at all inconsistent with *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922). In that case, the Supreme Court merely stated that "Oklahoma when she came into the Union took sovereignty over the public lands in the condition of ownership as they were then, and, *if* the bed had become the property of [an Indian Tribe], there was nothing in the admission of Oklahoma into a constitutional equality of power with other states which required or permitted a divesting of title." *Id.* at 87-88 (emphasis added). Here, the *Brewer-Elliott* condition precedent is not satisfied, as the beds at issue were not the property of the CN but rather the individual allottees, except in those limited instances of riparian land which was not allotted, alienated or otherwise sold by the federal government.

and that the catches from fish runs must be equitably apportioned. *Choctaw Nation*, 397 U.S. 620, dealt with the bed of the navigable portion of the Arkansas River, and with neither water nor biota. *Arizona v. California*, 373 U.S. 546, 601 (1963), does not support Defendants' assertions of CN sovereignty over all the natural resources in the IRW; rather *Arizona* quantified reserved water rights of certain tribes and federal facilities. As noted above, *Winters*, 207 U.S. 564, holds that when the Federal Government reserves land, by implication it reserves water rights necessary to accomplish the purposes of the reservation. *Winters* has no applicability here because of the adoption of the law of riparian water interests by Congress in 1890. Finally, *Cheyenne-Arapaho Tribes of Okla. v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980), did not recognize tribal sovereignty over biota. That was a case about hunting and fishing in which the tribe conceded that the State had jurisdiction over non-Indian hunting and fishing on Indian Country, and that hunting and fishing on non-Indian lands located within the 1869 reservation were not subject to exclusive tribal control but rather to a system of dual regulation. The Court noted that a number of decisions recognize dual control when needed to support conservation measures, relying upon *Puyallup Tribe v. Dep't. of Game of Wash.*, 391 U.S. 392, 398 (1968). *Id.* at 667. These cases do not support Defendants' assertion of CN ownership and sovereignty over all the biota of the IRW to the exclusion of the State.

2. The CN does not exercise exclusive sovereignty over all of the natural resources in the IRW

The 1906 Oklahoma Enabling Act provided that the inhabitants of the Oklahoma Territory and Indian Territory could adopt a constitution and become the State of Oklahoma, on

equal footing with the original states,[9] provided that "nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed." *See* 34 Stat. 267. Article I, section 2 of the Oklahoma Constitution carries this requirement into effect.

As detailed above, at the time of statehood the CN did not (and does not now) have ownership of and exclusive sovereignty over all of the natural resources of the IRW. In the Enabling Act of 1906, 34 Stat. 267, Congress passed "[a]n act to enable the people of Oklahoma and of the Indian Territory to form a constitution and State government and be admitted into the Union on an equal footing with the original States . . . ." Under the equal footing doctrine, the State had and continues to have a broad range of legally protected sovereign, quasi-sovereign / parens patriae, trustee and property interests in the IRW's natural resources.

Indeed, it is beyond dispute that the State has long regulated, controlled and exercised sovereign / quasi-sovereign authority over the natural resources of the IRW in Oklahoma. *See, e.g.,* Ex. 1 (Affidavit of J.D. Strong). Defendants have no authority establishing that the CN exercises sovereignty over *all* the resources in the IRW *to the exclusion of the State.*

III. Argument

A. Federal Rule of Civil Procedure 19 and its application

[9] The "equal footing doctrine" is "the constitutional principle that all States are admitted to the Union with the same attributes of sovereignty (*i.e.,* on equal footing) as the original 13 States." *Mille Lacs Band,* 526 U.S. at 203.

Evaluating a motion to dismiss under Rule 19 involves a two step process. First, this Court must determine under Rule 19(a) whether the person is necessary to the action,[10] and second, if the person is necessary to the action and cannot be joined, this Court must then determine under Rule 19(b) whether in equity and good conscience the action should proceed among the existing parties or should be dismissed.[11] *See* Fed. R. Civ. P. 19. "The moving party has the burden of persuasion in arguing for dismissal." *Rishell v. Jane Phillips Episcopal Memorial Medical Ctr.*, 94 F.3d 1407, 1411 (10th Cir. 1996) (quotations and citation omitted).

The Rule 19 inquiry "is not rigid or formulistic, but rather entails a practical examination of the circumstances on a case by case basis." *Picuris Pueblo v. Oglebay Norton Co.*, 228 F.R.D. 665, 667 (D.N.M. 2005). Finally, it should be noted that "[v]irtually all discussions of the indispensable party issue emphasize that courts are reluctant to dismiss pursuant to Rule 19(b) unless it appears serious prejudice will result." *Harran Transp. Co. v. Nat'l Trailways Bus Sys.*, 1985 WL 2349, *6 (D.D.C. Aug. 5, 1985); *see also Defenders of Wildlife v. Andrus*, 77 F.R.D. 448, 452 (D.D.C. 1978).

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[10] A party is necessary to the action if: "(A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1)(A) & (B). Notably, Defendants make no claim in their Motion that in the absence of the CN this Court cannot accord complete relief among the existing parties.

[11] Factors to be considered in determining whether in equity and good conscience the action should proceed among the existing parties or should be dismissed if the person is necessary to the action and cannot be joined include: "(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Fed. R. Civ. P. 19(b)(1)-(4).

B. Defendants have failed to satisfy their burden under Rule 19(a) for establishing that the CN is a necessary party

1. Defendants have failed to establish that the CN claims an "interest" relating to the subject of this action

"The relevant inquiry for Rule 19(a) is not whether the absent party has an 'interest,' in the broad sense, in the outcome of the litigation, but whether cognizable legal rights of the absent person will be prejudiced by the suit's continuation." *Sac & Fox Nation v. Norton*, 2006 WL 6117555, *6 (W.D. Okla. Nov. 27, 2006). Here, as the basis of their Rule 19 Motion, Defendants allege that the CN has claimed an ownership and exclusive sovereignty interest in all the IRW (that to date has never been formally asserted or defined by the CN) that will be impaired or impeded by this action. Defendants' allegation is untrue, and in any event, off the mark. The subject matter of the State's lawsuit is the pollution by Defendants of the natural resources of the IRW. It is not an action to quiet title to the land, water or natural resources of the IRW. The CN will not gain or lose title to land, water or natural resources over which it may claim an interest if the Court awards the State the relief it is seeking in this lawsuit. Nor will this action determine the CN's sovereignty interests in the natural resources of the IRW. As such, Defendants' claim that the CN is a necessary party under Fed. R. Civ. P. 19(a) must fail because Defendants have not established that the CN claims "an interest relating to the subject of the action."

United Keetoowah Band of Cherokee Indians v. United States, 480 F.3d 1318 (Fed. Cir. 2007), *reh'g en banc denied*, should guide the Court's analysis.[12] In *United Keetoowah*, the Keetoowah Band of Cherokee Indians ("UKB") brought an action against the United States

[12] Reflective of just how weak their argument really is, Defendants *repeatedly* cite and rely upon the reversed -- and analytically flawed -- lower court decision in *United Keetoowah* in their Motion.

seeking compensation for the extinguishment of all right, title and interest to Arkansas Riverbed Lands as permitted under the Cherokee, Choctaw and Chickasaw Nations Claims Settlement Act ("the Settlement Act"), as well as damages for breaches of the federal government's fiduciary duties with respect to these Riverbed Lands. The CN moved to intervene to move for dismissal of the UKB's claims pursuant to Rule 19 (something that has not occurred here), advancing two arguments. First, it argued that it is the sole titleholder of all Riverbed Lands identified in the Settlement Act, and therefore it was a necessary party to the UKB's action. Second, it argued that the UKB's claims were essentially claims against the CN over which the court had no jurisdiction due to the CN's sovereignty. The court granted the motion and the UKB appealed.

The Federal Circuit reversed, concluding that the lower court had erred in characterizing the CN's "interest." *Id.* at 1325. The Federal Circuit explained:

> Rule 19(a)(2) requires that the "interest" claimed by the absent party "relat[e] to the subject of the action." Thus, the proper analysis to determine whether an absent party has an "interest" under Rule 19(a)(2) sufficient to permit intervention in a pending action must begin by correctly characterizing the pending action between those already parties to the action. Hence, our analysis under Rule 19(a)(2) begins by characterizing the UKB's action because it is the UKB's action that is "the subject of the action" in which the [CN] must have an "interest."

Id. at 1326. The Federal Circuit then found that the subject matter of the action was extinguishment of the UKB's claims which occurred by virtue of the federal government's enactment of the Settlement Act and for which the UKB seeks compensation from the federal government. *Id.* It was not, as the CN had contended (and as the trial court had found), an action to establish title to the Riverbed Lands themselves. Rejecting the lower court's conclusion "that because the UKB claimed an interest in the same Riverbed Lands to which the [CN] claimed exclusive title, the action could adversely affect the [CN]'s ability to exercise sovereignty over the Riverbed Land," *id.* at 1235, the Federal Circuit held:

> As we find that the "subject" of the UKB's action is limited to claims permitted under the Settlement Act, we consequently find that the [CN] does not have "an interest relating to" the UKB's statutory claims. The "interest" the [CN] alleges and that it claims is "related" to the subject matter of the UKB's statutory action is its interest in retaining its alleged exclusive rights to the Riverbed Lands. However, the [CN]'s "interest" in retaining exclusive rights to the Riverbed Lands is an "indirect" and a "contingent" interest to the UKB's statutory claims against the federal government. *See Am. Mar. Transp.*, 870 F.2d at 1561. The [CN] will not "gain or lose" title to lands that it alleges ownership over if the trial court awards the UKB monetary damages under the Settlement Act.

Id. at 1326-27.

Such is precisely the situation here. The State's action is not an action to determine ownership of or sovereignty over natural resources of the IRW. Rather it is an action by the State against Defendants to remedy pollution of the natural resources in the IRW. Just as the lower court in *United Keetoowah* erroneously concluded that because the UKB claimed an interest in the same lands to which the CN claimed exclusive title, that action could adversely affect the CN's ability to exercise sovereignty over the lands, Defendants erroneously assert because the State claims an interest in the natural resources to which the CN is *alleged* to claim exclusive title, this action could adversely affect the CN's ability to exercise its sovereignty. Resolution of this action between the State and Defendants will not, however, result in the CN either gaining or losing title to land, water or other natural resources. Thus, for the same reasons set forth in *United Keetoowah*, Defendants have not established that the CN claims "an interest relating to the subject of the action." As such, the CN is not a necessary party under Rule 19(a)(1)(B), and the analysis can end here.

2. Defendants have not established that the CN in fact *claims* an interest in the subject of the action

The proponent of a motion to dismiss for failure to join a necessary party must show, *inter alia*, that the absent person "*claims* an interest relating to the subject of the action." *See*

Fed. R. Civ. P. 19(a)(1)(B). It is the absent party that must claim an interest. *See, e.g., Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043-44 (9th Cir. 1983). In *Northrop Corp.*, 705 F.2d at 1043-44, for example, the court held that the absent party -- the United States -- was not necessary within the meaning of Rule 19 in part because it "has never asserted a formal interest in either the subject matter of this action or the action itself. On the contrary, the record reflects that the Government has meticulously observed a neutral and disinterested posture . . . ."

The situation here is similar. This case has been pending for more than three years, yet to date the CN has not claimed an interest. The sum and substance of Defendants' evidence in support of their Motion are two 2004 letters from the CN addressed not to the State but rather to a third party, the United States Army Corps of Engineers. *See* Motion, Exs. 7 & 8. All that can be gleaned from these letters is that the CN has stated that it "has water rights that existed before Oklahoma became a state," *see* Motion, Ex. 8, which is not definitive at all. A statement that the CN "has water rights" does not equate to a claim of ownership of or exclusive sovereignty over all of the water of the IRW. Nor does it equate to a claim of ownership of or exclusive sovereignty over all of the other natural resources of the IRW. As detailed above, the CN's interests in the natural resources of the IRW do not rise to the level of a claimed interest in the subject of this action. Moreover and just as important, Defendants ignore the obvious fact, explained above, that in any event the "subject of the action" is not water rights or ownership / sovereignty interests in the other natural resources of the IRW. Because they have failed to satisfy their burden under Rule 19(a)(1)(B) of showing that the CN *claims* an interest in the subject of this action, Defendants cannot establish that the CN is a necessary party. Again, the Rule 19 analysis can end here.

3. Disposition of the action without the presence of the CN would not as a practical matter impair or impede any CN interests

Defendants have offered *no* evidence that an award of damages from Defendants to the State would as a practical matter impair or impede any CN interest. Likewise, Defendants have offered *no* evidence that the injunctive relief the State seeks against Defendants would as a practical matter interfere with or impair any CN interest. For instance, Defendants fail to explain how a ban or limitation on Defendants' disposal of poultry waste on land in the IRW would in any way implicate, let alone impair or impede, CN sovereignty concerns.

Although aware of this action since its inception, the CN *itself* has to date not taken steps to dismiss the case or otherwise raise sovereignty concerns. It can be assumed that as a practical matter the CN does not see this action impairing or impeding any of its interests in the natural resources of the IRW in Oklahoma. In fact, the State and the CN share a desire to stop Defendants' pollution. Their interests are aligned, and the State's action would actually advance any interests the CN may have in protecting the natural resources of the IRW.

Moreover, as pointed out above, the State's action is not an action to quiet title to the natural resources of the IRW. The State is not seeking a judgment against the CN. The CN will not gain or lose title to land, water or natural resources over which it may allege an ownership interest if the Court awards the State the relief it is seeking in this lawsuit. In sum, Defendants have failed to establish that the CN is a necessary party under Rule 19(a).

4. Disposition of the action without the presence of the CN would not leave Defendants at a substantial risk of incurring double, multiple or otherwise inconsistent obligations

Defendants have come forward with no evidence that they face a real risk of double, multiple or inconsistent obligations. "'The key is whether the possibility of being subject to multiple obligations is real; an unsubstantiated or speculative risk will not satisfy the Rule 19(a) criteria.'" *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001) (*quoting*

Wright, Miller & Kane, 7 Federal Practice & Procedure § 1604) (finding that "nothing in the record indicates the possibility of additional lawsuits involving this same subject matter"). Indeed, the facts confirm that Defendants' concerns are unsubstantiated and speculative. First, the relief being sought by the State will remedy the pollution at issue and thus would obviate any need for the CN to sue to address Defendants' pollution-causing conduct. Second, although the State's case has been pending for more than three years, the CN has not indicated that it intends to sue Defendants. Third, even if the CN were to sue Defendants, there is no reason to believe that the injunctive relief that it would seek would be more stringent than that which the State is seeking. And fourth, CERCLA precludes double recovery of natural resource damages. *See* 42 U.S.C. § 9607(f)(1). In short, Defendants have failed to carry their burden of establishing a real and substantial risk of incurring double, multiple or otherwise inconsistent obligations.

C. Even assuming arguendo that the CN were a necessary party under Rule 19(a), Defendants have failed to satisfy their burden under Rule 19(b) for establishing that in equity and good conscience dismissal of some or all of the State's claims would be appropriate

"Rule 19(b) analysis requires that the factors be evaluated in a practical and equitable manner, and be given the appropriate weight." *Rishell*, 94 F.3d at 1411.

1. Defendants' Rule 19 Motion to dismiss is untimely

In light of the delay in, as well as the reason for, Defendants bringing their Rule 19 Motion, equity and good conscience require that their Motion be denied. First, Defendants waited more than three years after the filing of the State's action to bring their Motion. Second, their Motion is not based upon any newly-discovered evidence. Third, Defendants have offered no explanation justifying their delay in bringing their Motion. Fourth, their Motion has been brought for defensive purposes rather than to protect CN interests. And fifth, under the Scheduling Order the deadline for joining additional parties has long since passed. Defendants'

Motion is pure eleventh-hour gamesmanship to derail the State's lawsuit, and denial of the Motion is clearly appropriate. *See, e.g.,* Advisory Committee Notes to 1966 Amendments to Rule 19 ("when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person (subdivision 19(a)(2)(ii)), and is not seeking vicariously to protect the absent person against a prejudicial judgment (subdivision 19(a)(2)(i)), his undue delay in making the motion can properly be counted against him as a reason for denying the motion"); *Fireman's Fund Ins. Co. v. Nat'l Bank of Coops.*, 103 F.3d 888, 896 (9th Cir. 1996) ("The Committee Note to Rule 19 . . . indicates that the district court has discretion to consider the timeliness of [a motion to dismiss for failure to join a party] if it appears that the defendant is interposing that motion for its own defensive purposes, rather than to protect the absent party's interests"); *Ilan-Gat Eng'rs, Ltd. v. Antigua Int'l Bank*, 659 F.2d 234, 242 (D.C. Cir. 1981) ("[T]he defendants' failure to make a timely [Rule 19] motion should have been considered in weighing the extent to which the defendants would be prejudiced by separate actions. . . . Such motions should be made early in the proceedings, and, though the motion is not automatically waived when not made in a responsive pleading, a court should, 'in equity and good conscience,' consider the timing of the motion, and the reasons for the delay, in weighing the prejudice to the moving party"); *Northeast Drilling, Inc. v. Inner Space Servs., Inc.*, 243 F.3d 25, 36-37 (1st Cir. 2001) (affirming denial of Rule 19(a) motion where defendant did not ask court for leave to modify scheduling order or articulate any good cause to excuse the belated filing).

2. A judgment rendered in its absence will not prejudice the CN

As explained above, Defendants have failed to establish that disposition of the State's action against Defendants without the presence of the CN would as a practical matter impair or impede any CN interests. For similar reasons, a judgment rendered in the absence of the CN will

not prejudice the CN. Specifically, Defendants have come forward with no evidence that a judgment granting the State damages against Defendants would in any way abrogate the CN's laws, ordinances or procedures. In fact, as a potential co-trustee under CERCLA, the CN could participate in designing programs funded by the State's CERCLA natural resources damages recovery. Nor have Defendants come forward with any evidence that a judgment granting the State injunctive relief against Defendants (*e.g.*, ordering Defendants to properly dispose of their poultry waste) would in any way abrogate the CN's laws, ordinances or procedures. Further, the State and the CN share a desire for natural resources that are not polluted. As such, their interests are aligned. *See Davis v. United States*, 343 F.3d 1282, 1291-92 (10th Cir. 2003) ("We note that in some cases the interests of the absent person are so aligned with those of one or more parties that the absent person's interests are, as a practical matter, protected").

Finally, even if sovereignty concerns were implicated -- which they are not -- the Tenth Circuit has not held that "[tribal sovereign] immunity is so compelling by itself as to eliminate the need to weigh the four Rule 19(b) factors." *Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1991). Nor has the Tenth Circuit "said [or] implied that cases *must* be dismissed whenever a tribe's sovereign immunity prevents it from being joined." *Id.* at 961 (emphasis in original).[13]

3. A judgment rendered in the absence of the CN will not unfairly prejudice Defendants

Defendants have failed to identify any real prejudice they would suffer if a judgment is rendered in the absence of the CN. Defendants ignore the fact that there will be no need for the CN to sue Defendants if the State receives the injunctive relief it seeks and that CERCLA natural resource damages law precludes double recoveries.

[13] *Republic of the Philippines v. Pimentel*, 128 S.Ct. 2180 (2008), relied upon by Defendants, is distinguishable. Unlike the Republic of the Philippines in *Pimental*, the CN here has not *itself* claimed prejudice or raised a claim of sovereign immunity.

4. Any prejudice that the CN or Defendants might face could be lessened or avoided by protective provisions in the judgment, by the shaping of relief or other measures

Even were there any sovereignty concerns with respect to the CN, those concerns could be addressed by the Court making clear in its judgment that it was not ruling on the issue of the extent, if any, of the CN's ownership of or sovereignty over the natural resources in the IRW. As to the concerns of Defendants, the Court could make clear in its judgment that 42 U.S.C. § 9607(f)(1) of CERCLA precluding double recoveries for natural resource damages applies.

5. A judgment rendered in the CN's absence will be adequate

The "adequacy" factor "is intended to address the adequacy of the dispute's resolution." *Davis*, 343 F.3d at 1293. Judgment entered in this action will adequately resolve the dispute at issue here, namely whether Defendants are legally liable for polluting the IRW. Should the State prevail at trial, liability for the pollution will be affixed and the judgment will award injunctive relief and damages aimed at resolving the problems caused by Defendants' poultry waste disposal practices. Inasmuch as the State and the CN both desire an IRW that is not polluted, the judgment will plainly be adequate.[14]

6. If the action were dismissed for nonjoinder, the State would not have an adequate remedy

For the reasons stated above, dismissal of *any* -- let alone *all* -- of the State's claims under Rule 19 would be inappropriate. If the Court were to dismiss some or all of the State's claims, however, the State would not have an adequate remedy. Corporate irresponsibility would be sanctioned, and Defendants' pollution of the IRW would continue unabated. The environmental

[14] Moreover, it should not be forgotten that "Rule 19 calls for a pragmatic approach; simply because some forms of relief might not be available due to the absence of certain parties, the entire suit should not be dismissed if meaningful relief can still be accorded." *Smith v. United Bhd. of Carpenters & Joiners of Am.*, 685 F.2d 164, 166 (6th Cir. 1982).

injury and human health threats would worsen with each passing year. Implicitly acknowledging this to be true, Defendants do not even address this Rule 19(b) factor in their papers.

D. Defendants' alternative motion is improper, and in any event the State has already established that it has standing to bring its damages claims

Defendants' alternative motion is that, as a matter of law, the State lacks standing to bring certain of its *damages* claims.[15] Defendants have not identified the rule under which they are making this Motion and no Federal Rule supports it. It cannot be a Rule 50(a) or 52(c) motion as those are *trial* motions. *See* Fed. R. Civ. P. 50(a) & 52(c). Further, Defendants have disclaimed that they are moving under Rule 56, *see* DKT #1797, p. 6, and in any event the Motion fails to comply with LCvR 56.1. Finally, Defendants have previously brought Rule 12 motions on the issue of standing, *see* DKT #1076 & #1235, and those motions have already been denied, *see* DKT #1187, #1435 & #1439, so the Motion cannot be a Rule 12 motion. The Motion simply has no basis in the Rules, and therefore should be denied. Should the Court nevertheless decide to consider it, however, the Motion should be denied for the reasons below (as well as those in the State's previous briefing and argument on the issue of standing).

1. The Court has already determined that the State has standing to prosecute its claims in this action

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[15] The plain language of the Motion makes clear that Defendants are *not* seeking judgment as a matter of law on standing as to *all* of the State's claims. Specifically, Defendants have not moved for judgment as a matter of law as to the State's claims for injunctive relief. Rather, they have moved *only* as to the State's claims for *damages*, and then only as to claims for damages *to those natural resources that are owned or held in trust by the Cherokee Nation*. *See* Motion, p. 3 (". . . Defendants move for judgment as a matter of law based on the fact that Oklahoma lacks standing to pursue claims *for damages* to natural resources that are owned or held in trust by the Cherokee Nation") (emphasis added). Furthermore, Defendants are not challenging *at all* the State's standing to assert its claims under RCRA, 27A Okla. Stat. § 2-6-105, 2 Okla. Stat. § 2-18.1, 2 Okla. Stat. § 10-9.7, Okla. Admin. Code § 35:17-5-5, or Okla. Admin Code § 35:17-3-14. *See* Motion, p. 3 ("If the State does not own or hold those resources in trust, then it lacks standing to assert claims under theories of *state nuisance, federal nuisance, CERCLA, trespass, or unjust enrichment*") (emphasis added).

Because CN does not own or exercise exclusive sovereignty over all the natural resources of the IRW, *see, supra,* section II.B.1, the Court need not decide the extent of any interests the CN may have in order to find the State has standing to assert its claims against Defendants in this action. It is clear that by virtue of the equal footing doctrine, *see, supra,* section II.B.2, the State has legally protected interests in all the natural resources located in Oklahoma. As explained in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907):

> This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity *the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain*. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.

(Emphasis added.)

The nature of the State's legally protected interests has been extensively briefed in the earlier motions attacking the State's standing, and include sovereign interests, quasi-sovereign / parens patriae interests,[16] trustee interests,[17] and property interests.[18] *See* DKT #1111 & #1255. These interests are not dependent on ownership or title (although the State does have property

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[16] *See, e.g., Tennessee Copper*, 206 U.S. at 237; *Massachusetts v. E.P.A.*, 127 S.Ct. 1438, 1454 (2007); *Hudson Cty. Water Co. v. McCarter*, 209 U.S. 349, 355 (1908); *Satsky v. Paramount Comm., Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993); *West Virginia v. Charles Pfizer & Co.*, 440 F.2d 1079, 1089 (2d Cir. 1971); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982); *Spiva v. State*, 584 P.2d 1355, 1359 (Okla. Crim. App. 1978); *State ex rel. Pollution Control Coordinating Bd. v. Kerr-McGee Corp.*, 619 P.2d 858, 861 (Okla. 1980); *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

[17] *See, e.g.*, 42 U.S.C. § 9607(f)(1).

[18] Regarding, for example, the State's property interests in waters within Oklahoma that run in definite streams, formed by nature, over or under the surface, *see* 60 Okla. Stat. § 60(A); *see also Depuy v. Okla. Water Resources Bd.*, 611 P.2d 228, 231-32 (Okla. 1980); *City of Stillwater v. Okla. Water Resources Bd.*, 524 P.2d 938, 944 (Okla. App. 1974) *Okla. Water Resources Bd. v. Cent. Okla. Master Conservancy Dist.*, 464 P.2d 748, 753 (Okla. 1969); *People v. Shirokow*, 605 P.2d 859, 864 (Cal. 1980); *Ronzio v. Denver R.G.W.R. Co.*, 116 F.2d 604, 606 (10th Cir. 1940); Dan Turlock, Law of Water Rights and Resources, § 5:49; Ex. 1 to Motion, 153:9-19 & 154:2-5; Ex. 2, Ford Test., 156:18-158:17.

interests in many of these resources). And these interests are themselves sufficient to establish the State's standing to prosecute its claims in this lawsuit. Indeed, this fact has already been judicially determined. The Court has already rejected Defendants' challenges to the State's standing. *See* DKT #1187, #1435 & #1439. As such, the authorities and arguments need not be repeated here in any detail.

Suffice it to say that when suing in its sovereign, quasi-sovereign or parens patriae capacity, the State may recover, *inter alia*, monetary damages for injuries to natural resources. *See, e.g., Pennsylvania ex rel. Rafferty v. Philadelphia Psychiatric Ctr.*, 356 F.Supp. 500, 505 (E.D. Pa. 1973); *Maine v. M/V Tamano*, 357 F.Supp. 1097, 1102 (D. Me. 1973); *Charles Pfizer & Co.*, 440 F.2d at 1089. Thus, the State has standing to assert its claims for damages under its theories of state law nuisance, federal common law nuisance, and unjust enrichment. And when suing in its trustee capacity, the State may recover, *inter alia*, CERCLA natural resource damages for injured natural resources within the State or belonging to, managed by, controlled by, or appertaining to the State.[19] *See, e.g.*, 42 U.S.C. § 9607(f)(1). Thus, the State has standing to assert its claims for natural resource damages in the IRW under CERCLA. And when suing to protect its sovereign property interests (*e.g.*, in the waters), the State may recover monetary damages for injuries to natural resources and, thus, has standing to assert its claims for damages

[19] CERCLA contemplates that there might be multiple trustees as to a given resource. "[T]rusteeship [under CERCLA] is not an all or nothing concept. In fact, in many instances, co-trustees are the norm and not the exception." *Coeur D'Alene Tribe v. Asarco, Inc.*, 280 F.Supp.2d 1094, 1115 (D. Idaho 2003). The *Coeur D'Alene* court explained in a subsequent opinion that "a co-trustee acting *individually* or collectively with other co-trustees may go after the responsible party or parties *for the full amount* of the [natural resource] damage, less any amount that has already been paid as a result of a settlement to another trustee by a responsible party." *United States v. Asarco, Inc.*, 471 F.Supp.2d 1063, 1068 (D. Idaho, 2005) (emphasis added).

under trespass (as well as state law nuisance, federal common law nuisance, and unjust enrichment).

2. The State has standing under the Arkansas River Basin Compact

Underscoring the State's standing is the Arkansas River Basin Compact ("Compact"). In 1973, Congress approved the Compact, the major purposes of which are the "equitable apportionment of the waters" of the Arkansas River Basin between the States of Arkansas and Oklahoma and the encouragement of the maintenance of an active pollution abatement program in each of these states. *See* 87 Stat. 569 & 82 Okla. Stat. § 1421, Articles I(B) & (D). This Compact established, as a matter of federal law, that the State has the right to "develop and use" the waters of the IRW, so long as it does not deplete the annual yield by more than sixty percent. *See* 87 Stat. 569 & 82 Okla. Stat. § 1421, Articles II(A-H) & IV(F). Article VII(E) authorizes the State's use of federal and state laws to resolve pollution problems in its portion of the Basin. Interstate compacts, when approved by Congress, have the force and status of federal law. *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906, 909, fn. 1 (10th Cir. 2008). The right to "develop and use" water and to use federal and state pollution laws to resolve pollution problems authorized in this Compact amounts to Congressional recognition of the State's legally protected interests in the water. Accordingly, it is indisputable that the State has standing to prosecute the current action.

3. In previous litigation Defendants have admitted that waters similarly situated to those at issue here are owned by the State

The Eucha-Spavinaw Watershed and the IRW are both within the historical boundaries of the CN. *See* Ex. 3 to Motion. Thus, with respect to the issue of State interests in water, Spavinaw Creek and Lakes Eucha and Spavinaw are similarly situated with the Illinois River and its tributaries and Lake Tenkiller. In the *City of Tulsa* litigation, Defendants admitted that the

State owns waters within the historical boundaries of the CN. See Ex. 3, p. 4 ("The State of Oklahoma is the owner of Spavinaw Creek, and thereby, the water that flows into Lakes Eucha and Spavinaw") (Cargill) (DKT #238); Ex. 4, p. 22 ("Tulsa does not own Lake Eucha and Spavinaw, the State of Oklahoma does") (All Poultry Defendants) (DKT #282); Ex. 5, pp. 110-114 ("The water is owned by the State of Oklahoma. . . . This lawsuit is brought over a body of water, or waters I should say, Spavinaw and Eucha, that are owned by the State of Oklahoma . . .") (Tyson Defendants' counsel, Jan. 3, 2003 Tr.); *id.* at 117-19 ("[The City of Tulsa's water right] "is a right . . . that could only be obtained from the State of Oklahoma. . . . [T]he right doesn't come from their land; it comes from the State of Oklahoma") (counsel "for Cargill and the other defendants," Jan. 3, 2003 Tr.). Thus, Defendants have already conceded that the State does have standing to assert its claims in this litigation; contrary arguments should be rejected.[20]

IV. Conclusion

Defendants' Motion [DKT #1788 & #1790] should be denied in its entirety.

[20] Defendants may cite to *Sevenoaks*, 545 F.3d at 913, for the proposition that the State does not enjoy an "ownership" in water resources located in the State. While it is not entirely clear what exactly the court meant when it used this term in quotes, what is clear is that a decision on the State's standing with respect to any or all of its claims in this action does not turn on whether the State "owns" the resource (and more particularly on whether the State "owns" the resource in the context of *Sevenoaks*). Furthermore, it should be pointed out that that statement by the court in *Sevenoaks* was dicta, made without any real analysis, and made in the context of discussing 11th Amendment immunity under *Verizon Maryland* and not in the context of determining the rights or interests in a natural resource per se.

Respectfully submitted,

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